Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-39

LAWRENCE MARQUETTE, MIDWESTERN FARM LINES, INC. AND HARVEST MOON FARM LINES, INC.

Petitioners

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Respondents

AMERICAN TRUCKING ASSOC., INC., ET AL., INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ET AL., TRAFFIC EXECUTIVE ASSOCIATION, ET AL., NATIONAL COUNCIL OF FARMER COOPERATIVES, A.W.A.R.E., INC.

Intervenors

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Lawrence Marquette, Midwestern Farm Lines, Inc. and Harvest Moon Farm Lines, Inc. pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on April 26, 1979.

OPINIONS BELOW

The Court of Appeals for the District of Columbia Circuit affirmed the rulemaking decision and order of the Interstate Commerce Commission in Ex Parte No. MC-75 (Sub No. 1), *Agricultural Cooperative Transportation Exemption (Modification of Regulations)* in an unpublished memorandum decision filed April 26, 1979. The Court of Appeals judgment and memorandum is printed in Appendix A (p. 1a), the original decision and order of the Interstate Commerce Commission are printed at Appendix B (p. 6a), and the Commission's amendment thereto at Appendix C (p. 64a). The Court of Appeals stayed its mandate until July 9, 1979, pending the filing of a petition for a writ of certiorari and a final determination thereon by this Court.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Has the Court of Appeals for the District of Columbia Circuit erred in sustaining the Interstate Commerce Commission's view that the exemption from the Interstate Commerce Act for Agricultural cooperatives must be strictly construed?

2. Has the Court of Appeals for the District of Columbia Circuit erred in sustaining the Interstate Commerce Commission's rule which as promulgated would exclude all single trip leasing of unowned equipment for hire by agricultural cooperatives in the transportation of non-member, nonfarmer commodities?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions involved are the self-incrimination and due process clauses of the Fifth Amendment

to the United States Constitution. The statutes involved are sections 10526(a)(5) (formerly §303(b)(5)), 11101(c)(1)(A) (formerly §304(f)), and 11144(c) (formerly §320(g)) of the Interstate Commerce Act; The Agricultural Marketing Act of 1929, 12 U.S.C. §1141 et seq.; 5 U.S.C. §§552, 553 and 559; the Administrative Procedure Act; 42 U.S.C. §6362(b) of the Energy Policy and Conservation Act; 42 U.S.C. § 4332(2)(c) of the National Environmental Policy Act of 1969; and 18 U.S.C. §1001. Regulations involved are 49 C.F.R. §§1047.21(a), 1047.22(b), and 1047.23. Pertinent excerpts of all provisions referred to above are reprinted in Appendix D (p. 88a).

Also involved is the Congressional Declaration of Policy set forth in the Agricultural Marketing Act of 1929, 12 U.S.C. 1141, which states in part:

> (a) It is declared to be the policy of Congress to promote the effective merchandising of agricultural commodities in interstate and foreign commerce so that the industry of agriculture will be placed on a basis of economic equality with other industries, and to that end to protect, control, and stabilize the currents of interstate and foreign commerce in the marketing of agricultural commodities and their food products—
>
> * * * * *
>
> (2) by preventing inefficient and wasteful methods of distribution.
>
> (3) by encouraging the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies.

STATEMENT OF THE CASE

Petitioners consist of an attorney and transportation counsel to the co-petitioners, and two agricultural cooperative associations, organized as defined in the Agricultural Marketing Act of 1929, 12 U.S.C. 1141j, heretofore engaging in interstate transportation under the agricultural cooperative exemption contained in the Interstate Commerce Act. All these petitioners were parties to the proceedings described below.

A. The Commission Proceeding

By a notice and order entered November 18, 1976, the Commission instituted a rulemaking proceeding pursuant to the Interstate Commerce Act and the Administrative Procedure Act. The stated purposes for the proceeding were (1) to more clearly define the exemption from regulation accorded motor vehicles controlled and operated by agricultural cooperatives or federations thereof and (2) to formulate new and revised requirements concerning record keeping and notice to the ICC with respect to certain transportation provided by agricultural cooperatives.

In response to the December 2, 1976 notice, more than sixty parties filed statements with the Commission commenting upon the nature and the need or lack thereof for the Commission's proposed regulations.

The Commission rendered a decision in the proceeding on December 22, 1977 (Appendix B, p. 6a). In its decision, the Commission while rejecting some of its proposed regulations, promulgated an amendment to 49 C.F.R. §1047.21(a) which proscribed the ability of agricultural cooperative's to utilize one-way trip-leases for the transportation of non-member, non-farm goods. The primary basis stated for this promulgation was that such transportation was not incidental and necessary to the primary transportation operation of cooperatives.

Petitions for administrative review were filed by the Petitioners herein. In a May 16, 1978 decision (Appendix C, p. 64a), the Commission denied the petitions for administrative review.

B. The Proceeding Before the Court of Appeals

On March 13, 1978, Petitioners sought review by petition to the Court of Appeals for the District of Columbia Circuit. The statute giving the Court of Appeals jurisdiction to review the decision and order of the Interstate Commerce Commission was 28 U.S.C. §§ 2321, 2344, 2347. By judgment and memorandum (Appendix A, p. 1a), filed on April 26, 1978, the Court affirmed the order of the Commission.

REASONS FOR GRANTING THE WRIT

The basic issue raised by this case involves encroachment by the Interstate Commerce Commission, through the exercise of its rulemaking powers, into statutorily exempt transportation services of agricultural cooperatives. The specific encroachments challenged by petitioners are: (1) a flat prohibition of one-way trip leasing transportation service by cooperatives to non-farm customers even in those cases where the provision of such services is essential to obtain backhaul business that is important to the economic viability of the cooperative's agricultural transport service; and (2) new notice and record keeping requirements that extend ICC administrative regulation into activities of agricultural cooperatives that are statutorily exempted from ICC regulation in both The Agricultural Marketing Act and The Interstate Commerce Act. Both of these specific subjects of complaint raise broader questions as to the proper boundary lines between the different legislative regimes established by Congress under The Agricultural Marketing Act and The Interstate Commerce Act, and as to the proper standards to be applied by the Interstate Commerce Commission in matters where its regulatory powers border statutorily exempt activities of agricultural cooperatives.

We would urge that this Petition brings before the Court a case of original impression as to the manner in which the Interstate Commerce Act and the Agricultural Marketing Act

are to be construed and reconciled by the courts and the Commission. In the same fashion that this Court found the basis for granting writ of certiorari in *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213(1966), we suggest that there is a serious need to resolve a conflict in the judicial interpretation of two major federal legislative schemes. The *Carnation* case considered the interrelationship of regulation under the Shipping Act, and regulation under the Sherman Act, and found that the Shipping Act could not be "construed as an implied repeal of all anti-trust regulation of the shipping industry's rate-making activities." 383 U.S. at 217.

We believe the Court in this case is presented with a similar question going to the interrelationship and possible collision of national policies expressed by Congress in agriculture and transportation.

In 1926, Congress enacted the Agricultural Marketing Act, 12 U.S.C. § 1141, et seq., to improve the economic well-being and efficiency of farmers and their cooperative associations. Congress declared its intention to:

> promote the effective merchandising of agricultural commodities in interstate and foreign commerce so that the industry of agriculture will be placed on a basis of economic equality with other industries, and to that end to protect, control, and stabilize the currents of interstate and foreign commerce in the marketing of agricultural commodities and their food products—
>
> * * * * *
>
> (2) by preventing inefficient and wasteful methods of distribution.
>
> (3) by encouraging the organization of producers into effective associations or corporations under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies. 12 U.S.C. 1141.

The Act then defined, and provided for, cooperative associations including any association in which "farmers act together ... distributing and/or furnishing farm supplies and/or farm business services" with non-members in excess of the total value of their member transactions. 12 U.S.C. § 1141j.

In extending the Interstate Commerce Act to motor carriers in 1935, Congress recognized the need to exclude farmer-related transportation from ICC regulation, and exempted "motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act ... or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined ...."

From 1935 to the present, the Commission, obviously frustrated at this limitation upon its generally pervasive regulatory powers, has sought to close the fence around this small province of regulatory immunity as closely as the law and the Courts would permit—and sometimes more closely than that.

In *ICC* v. *Jamestown Farmers Union Federated Co-op Transp. Ass'n,* 151 F.2d 403 (8th Cir. 1945), the Commission sought to enjoin the co-op from carrying livestock delivered to it by individual farmer-members and returning with merchandise to be sold to farmers. Because neither the cattle or the merchandise were picked up from or delivered to farm premises, the ICC saw a basis for tightening the exemption. The Court refused to enjoin the co-op, declaring:

> It is, of course, true that the exemption relied on by the appellee must be strictly construed when the necessity for construction arises. So construed, it may well be true, as the Commission contends, that a truck operated in interstate commerce by a farmers'

> cooperative for a purpose not within the contemplation of Congress in the Agricultural Marketing Act is not exempt from the requirement of a certificate of public necessity and convenience. But whether the interstate operation of such a truck is in an activity in which the farmers cooperative is or is not permitted to engage presents a question arising under the Agricultural Marketing Act, a *remedial statute, entitled to a liberal construction to effectuate the purpose for which it was adopted. It is this Act which requires construction here.* 151 F.2d at 404 (emphasis added).

It is precisely this accomodation that must, we submit, be made here. The Commission has construed the agricultural exemption, once more in an unlawfully restrictive fashion, relying on an overly literal reading of legislative history pertaining to an amendment to the Interstate Commerce Act, it has failed to give full and fair weight to the remedial nature of the Agricultural Marketing Act, which absent clear statutory expression to the contrary embodies a national policy transcending ICC common carrier regulations.

I. This case presents an important federal question of first impression concerning the boundaries between the Agricultural Marketing Act and the Interstate Commerce Act, and of proper standards of statutory construction; and a failure to arrest the ICC regulation will result in immediate, continuing and irreparable losses to farm cooperatives, both economically and in wasted energy.

The Commission's approach to the interpretive question presented herein is infected with the basic error that the agricultural exemption must be interpreted strictly, on the ground that all exemptions to the Interstate Commerce Act should be narrowly construed. We submit that this is error.

The Agricultural Marketing Act is itself remedial legislation, and therefore entitled to a broad construction to fulfill the objectives of that legislation. The Interstate Commerce Commission, moreover, in construing exemptions to its own jurisdiction in favor of a different, remedial statutory scheme, is not an impartial judge but, in effect, an interested party. The Commission's rulings in the instant case make abundantly clear the preference it is according to its own regulatory function over other legislative priorities. This misconception by the Commission of the proper statutory standard, and of its own sensitive role in such cases, serves to make this case a timely vehicle for establishing this fundamental principle.

The tension between the Commission's aggressive assertion of regulatory jurisdiction and the statutory exemption for agricultural cooperatives has been going on for years, but the proper standards for setting those boundaries remain unsettled, which leaves their determination by default to the Commission —an interested party. The practical effects of the present proceeding—which the Commission has failed to ascertain—can be substantial and will operate directly, and irreversibly, on sensitive agricultural and energy problems. Given the large number of people directly affected, and the conflicting federal agency and legislative schemes it would be wasteful and unnecessarily confusing to future policy makers to await the leisurely development of a conflict among circuits, or perhaps a case involving other issues. There is a substantial public interest at stake in this litigation.

II. The Commission's absolute ban on one-way trip leasing improperly bars activity that meets the standards of the statutory exemption.

Transportation of farm produce by agricultural cooperatives is exempted from the regulatory jurisdiction of the Interstate Commerce Commission. Insofar as transportation services by cooperatives are provided directly for member and farm

uses, there has been no real controversy. The problem arises from the economic reality that one-way transportation accompanied by an empty backhaul is often not economically viable. The only available backhauls are sometimes those of non-member, non-farm shippers. This problem led to an early recognition that such transportation, so long as it was only "incidental and necessary" to the basic agricultural cooperative transportation function, was within the meaning of the exemption and has been sanctioned by judicial decision and legislative amendment. Further experience has shown that there are some situations in which cooperatives, in order to secure their essential non-member backhaul business, must provide service to these same customers on an exceptional basis when their own equipment is not available, by one-way trip leasing of a third party's equipment. The Interstate Commerce Commission, seeking to restrict the activities of the cooperatives in any way it possibly can, has refused to consider such exceptional provision of service as "incidental and necessary."

The controlling legislative text is the Agricultural Marketing Act and section 203(b)(5) of the Interstate Commerce Act, the full text of which appears in Appendix D (pp. 88a-89a), and which provides in pertinent part:

> Nothing in this chapter, except the provisions of Section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operations or standards of equipment shall be construed to include... (5) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined, *but any interstate transportation performed by such a cooperative association or federation of cooperative associations for nonmembers who are neither farmers, cooperative associations, nor federations thereof for compensation, except transportation otherwise exempt under this chapter, shall be limited to that which is incidental to its primary transportation operation and necessary for its effective performance and shall in no event exceed 15 per centum of its total interstate transportation services in any fiscal year, measured in terms of tonnage* .... (emphasis added).

The italicized portion was added by amendment in 1968, following the decision of the Ninth Circuit Court of Appeals in *Northwest Agricultural Cooperative Association, Inc.* v. *Interstate Commerce Commission,* 350 F.2d 252 (9th Cir. 1965), *cert. denied,* 382 U.S. 1011 (1966). The agricultural cooperative in that case had carried non-farm products on a backhaul from delivering agricultural products, and the Interstate Commerce Commission contended that cooperatives should not be allowed to transport any non-farm commodities. The court, applying the Agricultural Marketing Act as a remedial statute, rejected that contention, holding that the backhaul was only incidental to the cooperative's primary agricultural purpose and was necessary to the economic viability of that purpose.

The amendment, Public Law 90-433, upheld the principle of the *Northwest* decision and sought to assure against abuse by legislating the criteria of that case—"incidental and necessary"—and imposing a ceiling of 15% of total tonnage hauled for all non-farm transportation.

Both the Senate and the House Committee Report referred, in identical language, to the *Northwest* decision:

> As indicated previously, the Court in [the] *Northwest* decision defined "incidental and necessary" as follows:
>
> * * * On the uncontradicted facts, Northwest's transportation of non-farm products and supplies was

> incidental and necessary to its farm-related transportation both in character and in amount—incidental because limited to otherwise empty trucks returning from hauling member farm products to market, and producing a small return in proportion to Northwest's income from trucking farm products and farm supplies; necessary because it is not economically feasible to operate the trucks empty on return trips and because the additional income obtained is no more than required to render performance of the cooperative's primary farm transportation service financially practicable.
>
> The Committee intends by the phrase "incidental to its primary transportation operation and necessary for its effective performance" that a cooperative's for-hire transportation for non-members must have the direct relationship above described to the cooperative's farm-related transportation. S. Rep. No. 1152, H.R. Rep. No. 1667, 90th Cong., 2d Sess. (1968).

These Committees did not contemplate the situation presented here, and did not conceive of infringing on the ability of agricultural cooperatives to prevent "inefficient and wasteful methods of distribution" under the Agricultural Marketing Act. There was no intent to do other than require a reasonable nexus between the business of the cooperative, the contribution toward the efficiency in transportation, and the elimination of wasteful backhauls.

Nevertheless, the Interstate Commerce Commission in a rulemaking proceeding adopted the following definition (49 C.F.R. § 1047.21(a):

> (a) the phrase "incidental to its primary transportation operation and necessary for its effective performance" means that the interstate transportation of the cooperative association or federation of cooperative associations for non-members as described above is performed with the same trucks or tractors employed in a prior or subsequent trip in the primary transportation operation of the cooperative association or federation, that it is not economically feasible to operate the trucks or tractors empty on return trips (outbound trips in cases where the primary transportation operation is inbound to the association or federation), and that the additional income obtained from such transportation is necessary to make the primary transportation operation financially practicable.

This language, while more specific and restrictive than that of the Court in the *Northwest* decision—requiring use of the same vehicle is more limiting than "the same direct relationship"—did not evoke major controversy until the instant proceeding, begun by the Commission on its own motion in November, 1976:

> The reason for the institution of the instant proceeding is our realization that the pertinent regulations may not be having the effect contemplated. Contrary to expectations, the number of organizations claiming the exemption has grown and unlawful motor carrier operations and solicitations by 'sham' agricultural cooperatives is detrimentally affecting the regulated transportation industry.[1]

The Commission accepted written comments but declined requests for an oral, adversary type proceeding.[2] Among the comments submitted there was substantial evidence that the realities of trucking economics required flexibility to obtain backhaul traffic which itself can be vital to the successful operation of cooperative transportation. The Commission, however, in its December 1977 decision, purported to be:

> hard pressed to conjure up a one-way trip-lease situation which meets both the 'incidental and neces-

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[1] Appendix B, p. 8a.
[2] Appendix B, pp. 21a-22a.

> sary' and 'control' tests, and we doubt that there is one. Even if one were presented to us, the occasion would be so rare that the effect of the amendment on legitimate agricultural activities would be *de minimus* [sic][3]

On petition for administrative review, the Commission conceded the economic argument for one-way trip leasing by legitimate cooperatives. Referring to the argument made by the Agricultural Transportation Alliance, the Commission stated:

> Its basic assumptions, which we do not dispute, are that (1) cooperative transportation, whether performed for members or non-members, is rarely, if ever perfectly balanced one-for-one so that for every outbound load there is always a return load and (2) non-member traffic is important to the economical and efficient transportation of member traffic. From these premises it postulates that in order to protect the non-member backhaul traffic it receives from a shipper to balance its member transportation a cooperative must, for legitimate business reasons, accept additional traffic from such shippers... Such additional traffic, the Alliance argues, may not balance out its member transportation and may require movement of shipments of the cooperative which are *wholly unrelated* to a prior or subsequent movement by a member.... The Alliance concludes that this one-way trip leasing which enables a cooperative to retain its backhaul traffic and, in turn, to transport efficiently member traffic, is therefore incidental to a cooperative's primary transportation operation and necessary for its effective performance. (Emphasis in original)[4]

[3] Appendix B, p. 45a.
[4] Appendix B, p. 71a.

The Commission did not disagree with this economic case: "We sympathize with the plight of cooperatives in this regard,"[5] but concluded that such service does not meet the statutory test. This conclusion in turn rested not on the language of the statute, but on the Commission's own more restrictive regulations which require that the non-farm transportation be made in the same vehicle.

We submit that this was error. The Commission, by opening on its own initiative the entire question of cooperative non-member transportation services, threw open that entire subject—including its existing regulation—to *de novo* inquiry. The Commission, however, treated its existing regulation as a closed subject, disregarded the testimony of the President's Council on Wage and Price Stability as to the economic and energy waste that the Commission's proposal involved, failed to make a good faith effort to ascertain the specific facts as to the economic effects of its actions, which was compounded by the Commission's failure to provide either an energy impact statement required by the Energy Policy and Conservation Act 42 U.S.C. § 6362(b) or an environmental impact statement required by the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(c), and its own regulations, 49 C.F.R. § § 1108.9 and 1108.10. In each case the Commission relied on its own prior regulation to conclude that its new express prohibition of one-way trip leasing did not change prior law, despite the fact that the existing regulation was not effective and in need of clarification. The Commission thus failed, also, to satisfy the minimal standards of the Administrative Procedure Act, 5 U.S.C. § § 552, 553 and 559.

The Commission's proposed regulation also exceeds its statutory authority. The proposed regulation, 49 CFR § 1047.22 (b), requires cooperatives to prepare and retain for two years detailed and extensive records pertaining to all of the interstate transportation operations. The Commission, however, has no authority to require agricultural cooperatives to

[5] Appendix B, p. 72a.

prepare and retain any types of records. It has authority only, pursuant to § 220(g) of the Act, to "have access to . . . to inspect, examine and copy" all accounts, records, etc. which pertain to the motor vehicle transportation of the cooperative. That same section specifically prohibits the ICC from prescribing "the form of any accounts, records, or memorandums to be maintained by a cooperative association or federation of cooperative associations."

Further, the amendments to 49 C.F.R. § 1047.23 regarding notice required of agricultural cooperative associations who serve necessary and incidental non-farm, nonmembers exceed the agency's statutory jurisdiction. The regulation requires, *inter alia,* that all officers and directors provide the agency with information as to any affiliation they have had with other agricultural cooperative associations within the past five years; a certificate stating that all signatories of the notice will submit to § 220(g) visitation, inspection and copying of records pertaining to the interstate transportation conducted by a cooperative, regardless of the scope of the request for any such records; and a certificate providing that failure to file supplemental "notices" with the Commission subjects the individuals to criminal penalties pursuant to 18 U.S.C. § 1001. These notices, moreover, require representations to be made subject to the foregoing criminal sanction that require impossible knowledge of future acts and complicated legal issues such as:

> I have personally acquainted myself with the requirements of section 203(b)(5) of the Interstate Commerce Act and the Commission's regulation (49 CFR 1047.20 to 1047.23, inclusive) . . . that the association or federation on whose behalf this notice is filed is a cooperative association as defined in the Agricultural Marketing Act. . . which intends to engage in interstate transportation for non-members. . ; that the original of this notice is being filed with the Secretary, Interstate Commerce Commission, . . . that a copy of this notice shall be carried upon each truck or tractor

> engaged in interstate transportation pursuant to section 203(b)(5) of the Interstate Commerce Act . . . .

To require such open-ended exposure to criminal liability through required written statements is a violation of the Fifth Amendment to the Constitution of the United States.

In these requirements, as in the substantive question of the one-way trip-lease, the Commission is unilateraly seeking to extend its regulatory jurisdiction into matters that are statutorily exempt.

CONCLUSION

For the foregoing reasons, it is respectively requested that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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